84-74
No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

WILLIAM R. BAILEY,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MICHAEL E. DEUTSCH
343 South Dearborn Street
Suite 1607
Chicago, Illinois 60604
312/663-5046

SHELLEY A. BANNISTER
MARGARET BYRNE
BANNISTER & BYRNE
4669 North Manor Avenue
Chicago, Illinois 60625
312/583-8016

Counsel for Petitioner

Pandick Midwest, Inc. Chicago • 454-7600

36pp

QUESTION PRESENTED FOR REVIEW

Is the loss of government property material to a jury determination of guilt of the offense of embezzlement of funds of the United States?

LIST OF PARTIES

All parties appear in the caption of the case.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Other Authorities

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

WILLIAM R. BAILEY,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioner, WILLIAM R. BAILEY, prays that a writ of certiorari be issued to review the decision of the United States Court of Appeals for the Seventh Circuit.

OPINION BELOW

There are no reported decisions below. The opinion of the Seventh Circuit Court of Appeals affirming the jury's verdict in the District Court is attached in the Appendix.

JURISDICTION

Judgment was entered against the petitioner on July 27, 1982. The Seventh Circuit Court of Appeals affirmed that judgment on May 11, 1984. Petitioner seeks a writ of certiorari pursuant to 28 U.S.C. § 1254(1).

STATUTES INVOLVED

18 U.S.C. § 641:

> Whoever embezzles, steals, purloins, or knowingly converts to his use or the use of another, or without authority, sells, conveys or disposes of any record, voucher, money, or thing of value of the United States or of any department or agency thereof, or any property made or being made under contract for the United States or any department or agency thereof; or
>
> Whoever receives, conceals, or retains the same with intent to convert it to his use or gain, knowing it to have been embezzled, stolen, purloined or converted-
>
> Shall be fined not more than $10,000 or imprisoned not more than ten years, or both; but if the value of such property does not exceed the sum of $100, he shall be fined not more than $1,000 or imprisoned not more than one year, or both.
>
> The word "value" means face, par, or market value, or cost price, either wholesale or retail, whichever is greater.

18 U.S.C. § 1001:

> Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than $10,000 or imprisoned not more than five years, or both.

STATEMENT OF THE CASE

The government charged William Bailey in a four-count indictment which alleged that he wilfully and knowingly embezzled, stole and converted to his own use money of the United States in violation of 18 U.S.C. § 641 (Counts I to III); and that he wilfully and knowingly made a false, fictitious and fraudulent statement and representation as to a material fact in a matter within the jurisdiction of a federal agency in violation of 18 U.S.C. § 1001 (Count IV). The four counts related to Bailey's function as a designated loan closing attorney retained by persons borrowing funds from the Farmers Home Administration (FmHA) of the United States Department of Agriculture.

The government presented evidence at trial that Bailey received checks from the borrowers who had endorsed the checks from FmHA to Bailey. Bailey deposited the checks into his attorney trust fund account and paid the clients' creditors from the funds. In three cases, the government charged that certain creditors of the FmHA borrowers represented by Bailey were not paid.

In one of the cases, the government charged that Bailey knowingly made a false statement to the FmHA regarding the disbursement of funds that he had received from the client. The trial court instructed the jury that whether or not the government proved monetary loss to the government is immaterial. The jury returned verdicts of guilty on all counts.

On appeal to the Seventh Circuit Court of Appeals, Bailey argued that the proof of loss instruction was an incorrect statement of the law. The Ninth Circuit had held that proof of actual property loss by the government is an essential element of the crime set out in 18 U.S.C. § 641. *United States* v. *Collins*, 464 F.2d 1163 (9th Cir. 1972). The Seventh Circuit disagreed with the Ninth Circuit and held that proof of the government's loss is unnecessary to prove a violation of 18 U.S.C. § 641.

REASONS FOR GRANTING THE WRIT

A.

The Seventh Circuit Is in Conflict with the Decisions of Other Circuits Which Have Held That Property Loss Is an Essential Element of the Offense of Embezzlement.

The Seventh Circuit Court of Appeals relied upon the following elements of embezzlement in affirming the defendant's conviction: 1) there was a trust or fiduciary relationship; 2) the property claimed to have been embezzled is within the purview of the statute; 3) the property came into the possession or care of the defendant by virtue of his employment; 4) the property is property of another; 5) defendant fraudulently converted or appropriated the property to his own use; and 6) the defendant had the intent to deprive the owner of the property. *United States* v. *Powell,* 294 F.Supp. 1353 (E.D. Va. 1968), aff'd. 413 F.2d 1037 (4th Cir. 1960); *United States* v. *Bailey,* slip opinion at p.13. After applying these elements and assessing the development of the law of embezzlement, the Seventh Circuit disagreed with the Ninth, Fifth and First Circuit Courts of Appeals when it held that proof of the government's property loss is unnecessary to prove a violation of 18 U.S.C. § 641. *United States* v. *Bailey,* slip opinion at p.16.

This ruling ignores the meaning of the fifth element of embezzlement: the requirement that the government prove a fraudulent conversion or appropriation of the property. The Ninth Circuit's opinion in *United States* v. *Collins,* 464 F.2d 1163 (9th Cir. 1972), correctly stated that it is an essential element of the crime of stealing government property under this statute that the government have suffered an actual property loss. 464 F.2d at 1165. As referred to above, this principle has been adopted by the First and Fifth Circuit Courts of Appeals. *See United States* v. *Evans,* 572 F.2d 455, 471 (5th Cir. 1978), and *United States* v. *Forcellati,* 610 F.2d 25, 30 (1st Cir. 1979), *cert. den.* 445 U.S. 944 (1980). *See also United States* v.

Farrell, 418 F. Supp. 308, 310 (M.D. Penn. 1976); *United States* v. *Edwards,* 473 F.Supp. 81, 82 (D. Mass. 1979); *United States* v. *Gavin,* 535 F.Supp. 1345, 1348 (W.D. Mich. 1982).

A review of the history behind the present statute reveals the development of the elements of the offense as stated above, and shows that property loss is in fact a requirement in proving a fraudulent conversion or appropriation. The word "embezzlement" was used in a number of English statutes prior to 1799 as a synonym for larceny by a servant. Hall, Jerome, *Theft, Law and Society,* p. 28. Larceny by a servant occurred when property was received by a servant from his master and the servant converted it to his own use.

The law of embezzlement was created to solve the problem created when a servant received property from a third person on behalf of his master and then converted it. Prior to 1799, when the first general embezzlement statute was enacted, such an act would not constitute a criminal offense.

Before the passage of that embezzlement statute, in *The King* v. *Joseph Bazeley,* 2 East, P.C. 571; 168 Eng. Reprint 517 (1799), a bank teller pocketed a one hundred pound note while crediting a customer's account for that amount. Since the bank never came into possession of the note, the court held that the bank teller could not have taken it from the bank; defendant was acquitted.

Embezzlement laws were then enacted to punish criminally persons who took property from their employers. Prior to that law, employers only had a right to redress their loss in the civil courts.

As recognized by the Seventh Circuit below, embezzlement is common law larceny extended to cover situations in which the stolen property initially came in to the hands of the defendant without a trespass. *United States* v. *Bailey,* slip opinion at p.13. Blackstone defined larceny as the felonious

taking and carrying away of the personal goods of another. *See Boone* v. *United States,* 235 F.2d 939, 940 (4th Cir. 1956), and reference to it in *United States* v. *Turley,* 352 U.S. 407, 412 (1957).

The common law definition of larceny generally consists of the taking and carrying away of the personal property of another with the intent to deprive the owner of the property permanently; and to convert the property to the use of someone other than the owner. 50 Am. Jur. 2d, Larceny, § 2. Where the taker has been entrusted with possession of the property, the taking is more correctly described as embezzlement. 26 Am. Jur. 2d, Embezzlement, § 3. *See also United States* v. *Waronek,* 582 F.2d 1158, 1161 (7th Cir. 1978).

This Court has stated that:

> Embezzlement is the fraudulent appropriation of property by a person to whom such property has been entrusted, or into whose hands it has lawfully come. It differs from larceny in the fact that the original taking of the property was lawful, or with the consent of the owner, while in larceny the felonious intent must have existed at the time of the taking.

Moore v. *United States,* 160 U.S. 268, 269 (1845). An indictment charging larceny alleges that a defendant stole, took, and carried away specified goods belonging to a named person. *Moore* v. *United States,* 160 U.S. at 273.

As is apparent from these definitions, embezzlement differs from larceny only in that the property taken is lawfully possessed initially. Otherwise, the criminal act is identical: the taking and carrying away of property of another.

The taking of property that belongs to another results in a loss to that party. If the government proves a taking, then, concomitantly, it also must prove a loss to the person or entity that owned the property.

Conversion occurs when the owner of property is deprived of the power to exercise control over his property, and the converter has acquired that power. *United States* v. *Tijerina,* 407 F.2d 349 (10th Cir. 1969) *cert. den.* 396 U.S. 843, 867. Proof of conversion involves the proof of loss of power on the part of the owner. The government must prove loss to the owner of property when the taker of the property is charged with converting the property; similarly, the government must prove loss in an embezzlement case since conversion is an element of embezzlement.

Title 18, U.S.C. § 641 proscribes the activities of embezzlement, stealing, purloining, and converting. In the instant case, the indictment charged that the defendant did wilfully and knowingly embezzle, steal, and convert to his own use money of the United States. This Court, in *United States* v. *Turley,* 352 U.S. 407 (1957), chose to define the word "stolen" broadly as encompassing an embezzlement or other felonious taking with the intent to deprive the owner of the rights and benefits of ownership. 352 U.S. at 408. The Court stated that the term "stolen" has no common law meaning, but that originally it denoted a taking through secrecy or strategem. "It became the generic designation for dishonest acquisition." 352 U.S. at 411-412 citing *Boone* v. *United States,* 235 F.2d 939, 940 (4th Cir. 1956).

In order to prove the criminal offense of stealing, the government has to prove a taking of property with the intent to deprive the owner of a right to that property with the resultant loss of that property by the owner.

This Court noted in *United States* v. *Morissette,* 342 U.S. 246, 266 (1951), that the present statute was enacted "to collect from scattered sources crimes so kindred as to belong in one category." All of the designated crimes require proof of intent and this Court found no reason to differentiate among them in that regard. Similarly, just as stealing and converting require a taking of property and loss to the owner of that property, there is no reason, as its evolution shows, to require less in proving embezzlement.

The trial court's instruction in the instant case that it was immaterial whether or not the government proved actual property loss incorrectly stated the law to the jury. Clearly, whether or not property loss was proven was material to the jury's determination of whether or not the defendant had been proven guilty beyond a reasonable doubt of fraudulently converting to his own use property of the United States.

Loss to the rightful owner is an element of conversion and therefore of embezzlement. If the government does not have to prove loss, because the instruction states loss is immaterial, the government is relieved of the burden of proving one of the essential elements of the offense. Accordingly, this Court should review the Seventh Circuit's decision and bring the Seventh Circuit into conformity with the Ninth, Fifth and First Circuit Courts of Appeals. This Court should issue a writ of certiorari so that the government's burden in Title 18, U.S.C. § 641 prosecutions can be made uniform throughout the Circuits.

B.

The Seventh Circuit Is In Conflict With The Decision of Other Circuits And This Court Which Have Held That Property Loss Is Material to The Ownership Element of Embezzlement.

The trial court's instruction to the jury in this case that it is immaterial whether the government proved actual property loss was given after the court's instruction that the government must prove that the funds involved were funds of the United States. As stated above, the Ninth Circuit Court of Appeals held in *United States* v. *Collins,* 464 F.2d 1163 (9th Cir. 1972), that property loss is an essential element of the crime of stealing government property.

The Ninth Circuit relied on *United States* v. *Johnston,* 268 U.S. 220 (1952), in requiring the government to prove actual loss. In *Johnston,* this Court agreed with the defendant's position that, after admitting persons to a boxing match,

defendant was a debtor of the government's—not a bailee—since he owed the government a tax on each admission to the match. The conviction for embezzlement could not lie since the money owed to the government was not the property of the United States until it was paid to the government.

The government in *Johnston* had sustained no loss of funds because it did not own the tax amounts that the defendant had collected from spectators at the boxing event. In *Collins,* the court found that the city warrant which the defendant forged and cashed was the property of the city and that the money erroneously given to the defendant was the property of the bank. Since the bank paid on a forged endorsement, it had expended its own money even if the funds in the city account were federal in origin. The government sustained no loss because the money did not constitute funds of the United States. The defendants' convictions for embezzlement of government funds were reversed in both cases.

In the instant case, the jury heard evidence that checks were issued by the United States Treasury to various FmHA borrowers. Those borrowers then endorsed the checks to the defendant. The government had to prove that the funds allegedly embezzled by the defendant were the property of the United States. Whether or not the government sustained a loss of funds certainly was material to the jury's determination of that question. The jury may have decided that the borrowers were the parties who were deprived of their funds, and that the only loss suffered was by them. If this instruction had not been given, the jurors would have been free to decide that, in fact, the funds involved were not of the United States; and that the defendant was not guilty of the charged offenses. The instruction as given has the effect of confusing the jury on this point and may have unfairly resulted in the defendant's conviction.

This Court should issue a writ of certiorari to review the giving of this instruction that erroneously stated the law.

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests that a writ of certiorari be issued to review the judgment below.

Respectfully submitted,

MICHAEL E. DEUTSCH
343 South Dearborn Street
Suite 1607
Chicago, Illinois 60604
312/663-5046

SHELLEY A. BANNISTER
MARGARET BYRNE
BANNISTER & BYRNE
4669 North Manor Avenue
Chicago, Illinois 60625
312/583-8016

Counsel for Petitioner

Note: This Petition was prepared with the assistance of Janine Louise Hoft, a law school graduate studying for the Illinois bar examination.

APPENDIX

In the

United States Court of Appeals

For the Seventh Circuit

No. 82-2280

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

WILLIAM R. BAILEY,

Defendant-Appellant.

Appeal from the United States District Court for the Central District of Illinois, Rock Island Division.
Criminal No. 82-40003—Robert D. Morgan, *Judge.*

ARGUED NOVEMBER 9, 1983—DECIDED MAY 11, 1984*

Before CUMMINGS, *Chief Judge,* WOOD, *Circuit Judge,* and CAMPBELL, *Senior District Judge.***

CAMPBELL, *Senior District Judge.* William Bailey, a former attorney, was charged by the Grand Jury with

---

* This opinion has been circulated among all judges of this court in regular active service. No judge favored a rehearing *en banc* on the question of the conflict with the Ninth Circuit case of *United States v. Collins,* 464 F.2d 1163 (9th Cir. 1972).

** The Honorable William J. Campbell, Senior District Judge of the Northern District of Illinois, is sitting by designation.

three violations of 18 U.S.C. §641[1] (embezzlement of public funds) and one violation of 18 U.S.C. §1001[2] (making a false statement to a government agency). The allegations arose out of certain irregularities which occurred in Farmers Home Administration (FmHA) loan transactions in which Bailey was the closing attorney. The jury found the defendant guilty on all counts and the court sentenced him to concurrent prison terms of ten years as to each of the embezzlement counts and five years on the false statement charge. Bailey appeals his convictions raising issues as to the sufficiency of the evidence, the propriety of the jury charge, the effectiveness of defense counsel, and the severity of the sentence. For the reasons stated below, we affirm.

---

[1] 18 U.S.C. §641 provides:

> Whoever embezzles, steals, purloins, or knowingly converts to his use or the use of another, or without authority, sells, conveys or disposes of any record, voucher, money, or thing of value of the United States or of any department or agency thereof, or any property made or being made under contract for the United States or any department or agency thereof; or
>
> Whoever receives, conceals, or retains the same with intent to convert it to his use or gain, knowing it to have been embezzled, stolen, purloined or converted—
>
> Shall be fined not more than $10,000 or imprisoned not more than ten years, or both; but if the value of such property does not exceed the sum of $100, he shall be fined not more than $1,000 or imprisoned not more than one year, or both.
>
> The word "value" means face, par, or market value, or cost price, either wholesale or retail, whichever is greater.

[2] 18 U.S.C. §1001 provides:

> Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than $10,000 or imprisoned not more than five years, or both.

Appellant's convictions arose out of three separate real estate transactions. The lender in each case was the FmHA, an agency of the United States government. The borrowers were private parties. Bailey was the closing attorney in each transaction. However, his responsibilities exceeded those of a normal real estate lawyer engaged in private representation.[3] He was trained and certified by the FmHA to be a closing attorney for its loans and he received specific directions from it regarding his duties with respect to each transaction. Technically, however, he was employed by the borrower although he also acted as the escrow agent for the funds involved in each transaction. The facts of the three transactions involved in this case are summarized below.

The Johnson Loan

In September 1978 appellant was retained as the closing attorney for a FmHA loan to Janice Johnson. Johnson received a loan of approximately $33,000 to purchase a house from Thomas and Peggy Bein. The Beins had a FmHA mortgage on the house in the approximate amount of $33,000. Bailey received from the agency a United States Treasury check for $33,488 made out to Janice Johnson along with written instructions regarding the transaction. He was directed to use the loan proceeds to satisfy the outstanding loan of the FmHA and to pay certain fees and costs involved in the closing. Johnson endorsed the check to the defendant who then deposited it in his trust account at the Rock Island Bank. Thereafter, Bailey disbursed approximately $4,200 from the trust account in five separate checks to cover various expenses related to the loan. Under the loan closing instructions, the defendant should have satisfied the FmHA loan by sending back to the agency the balance of the loan proceeds. However, on September 28, 1978, Bailey submitted

[3] For the regulations describing the FmHA's procedures and guidelines for using designated attorneys, see 7 C.F.R. §1890t.2.

a loan closing statement which represented that $32,908.55 had been paid to the Beins to satisfy the outstanding mortgage on the property, but it is undisputed that the appellant had only disbursed $1,426.77 to the Beins.

In February 1980 a FmHA official asked the appellant about the money the agency should have received at the conclusion of the Johnson loan transaction. Bailey stated that he had sent the agency a check for the balance, but approximately a month later the appellant told another inquiring FmHA official that he was still working on the loan and would soon send the agency a check. Nonetheless, the FmHA never received any check from the defendant with regard to the Johnson closing.

Count 1 of the indictment alleged that the defendant had embezzled the loan proceeds from the Johnson loan and Count 4 alleged that the defendant had knowingly made a false statement to the agency in the loan closing statement.

The Powell Loan

In January 1979 Bailey was retained as the loan closing attorney of a FmHA loan to Vaughn Powell. The loan was for $206,000 and was intended to permit the borrower to remove the various liens from his farm property and to consolidate his debts. Bailey received specific instructions from the agency to satisfy the various liens, to execute the mortgage documents, and to remit any balance to the FmHA. Powell endorsed the $206,000 United States Treasury check and gave it with another check for $12,042, from an earlier FmHA loan, to the appellant. Bailey deposited the checks in his trust account at the First National Bank of Rock Island. Thereafter, he disbursed $213,042.87. The remaining $4,099.13 was never accounted for and no loan closing statement was ever sent to the FmHA.

Count 2 of the indictment alleged that the defendant's retention of the excess funds constituted embezzlement of United States government property.

The Weeks Loan

In early 1979 Ronald and Anna Weeks obtained a loan from the FmHA to finance and consolidate their debts including three non-real estate FmHA loans. Two United States Treasury checks were issued by the agency to the borrowers, one for $28,500 and one for $2,000. The appellant was retained as the closing attorney and received instructions from the agency to clear title to the real estate, supervise the execution and recording of a FmHA mortgage, and then to deposit the proceeds into a bank account supervised by the FmHA. Mr. and Mrs. Weeks endorsed the checks to the defendant, who deposited them in his trust account at the Rock Island Bank. However, no creditors of Mr. and Mrs. Weeks were ever paid by Bailey and no money was ever returned to the FmHA. As in the Powell transaction, no closing statement was ever submitted by Bailey to the FmHA. Count 3 of the indictment alleged that the defendant embezzled the entire amount of the proceeds from the loan to Mr. and Mrs. Weeks.

In addition to evidence regarding those transactions, the government introduced bank records showing the activity in the defendant's trust accounts during the relevant time period. The records revealed that on July 26, 1979, approximately one month after depositing the checks from the loan to the Weeks, the defendant withdrew $31,500 to open an account at the Rock Island Bank for a corporation called Yong Sun, Inc. Bailey's business partner, Mrs. Yong Sun Chong, subsequently bought a tavern and liquor store in Rock Island. At trial, the defendant called Mrs. Chong who testified that she and the defendant were in the liquor business together. She stated that she and Bailey had bought the business for $130,000 and that they had to pay a $40,000 down payment. However, she claimed that they had borrowed the money from the Rock Island Bank although she produced no documentation nor could she recall any of the terms of the loan.

The jury found the defendant guilty of all four counts in the indictment. At the sentencing hearing Bailey tes-

tified that he was presently unable to make restitution although he had discussed the matter with his bonding company. He expressed a willingness to pay restitution over a period of time if his business ventures provided sufficient income to do so. In imposing the sentence, the court stated:

> THE COURT: Well, Mr. Bailey, the Court has considered this matter very carefully and, as you know, I presided at the trial. The jury was satisfied of your guilt of all four counts, and I am fully satisfied of your conscious guilt in this matter, that you didn't have the capacity to hold a license to practice law that you held.
>
> I have read and considered your long statement and everything that has been said here this morning. We are not involved here with a matter of paying debts or making restitution alone, although I realize that is involved. We are not involved with a matter of adjustment with the bonding company. They took a risk for a premium and their risk proved false as well, all due to your breach of fiduciary responsibility which you knew you undertook when you took your oath to practice law.
>
> Now, I am satisfied that prompt and full restitution is unlikely which makes probation or fines inappropriate in this matter. I agree with Mr. Smith that the matter is aggravated by your status as an officer of the court.
>
> It will be the sentence of the Court that you be remanded to the custody of the Attorney General of the United States for ten years each on Counts I, II and III and five years on Count IV, all to run concurrently with each other. There will be no order on costs. Sent. tr. p. 10.

After a brief colloquy with defendant's counsel, the court noted:

> As I think you and Mr. Bailey are aware with that in this community in the last year or so a couple of other fiduciary cases where there was a substantial breach of duty and attendant violation of the federal statutes which resulted in similar sentences. I'm trying to be consistent. Sent. tr. p. 11-12.

Appellant argues that the §641 convictions must be reversed because the money involved in the real estate transactions was not the property of the government. Bailey contends that once the treasury checks were endorsed by the borrowers the money became the property of the borrowers. Under virtually identical facts, this argument was rejected in *United States v. McIntosh*, 655 F.2d 80 (5th Cir. 1981), *cert. den.* 455 U.S. 948 (1982). However, the appellant suggests that the Fifth Circuit uses a different analysis than this court for determining government property for purposes of §641 and therefore *McIntosh* should not be persuasive precedent.

We perceive no conflict in the law of the two circuits. In *McIntosh*, the court characterized the Fifth Circuit's test by quoting from *United States v. Evans*, 572 F.2d 455, 472 (5th Cir. 1978):

> [T]he key factor involved in this determination of federal interest is the supervision and control contemplated and manifested on the part of the government.

In *United States v. Mitchell*, 625 F.2d 158, 161 (7th Cir. 1980), *cert. den.* 449 U.S. 984 (1981), the court described the appropriate analysis as whether the government retained a sufficient property interest in the funds, *citing United States v. Maxwell*, 588 F.2d 568 (7th Cir. 1978), *cert. den.* 444 U.S. 877 (1979). However, title to the property is not controlling, *see Maxwell*, 588 F.2d at 573, the determination being based on the government's supervision and control over the property, *see Mitchell*, 625 F.2d at 161. Thus, there is no significant distinction between the two circuits in their criteria for determining government property for purposes of §641. We also note that

the two Circuits have reached the same result on similar facts, *compare Maxwell with United States v. Rowen*, 594 F.2d 98 (5th Cir. 1979), *cert. den.* 444 U.S. 834 (1979) and *United States v. Smith*, 596 F.2d 662 (5th Cir. 1979); and that each circuit cites the other's cases with approval, *see e.g. Mitchell*, 625 F.2d at 161; and *Rowen*, 594 F.2d at 100. Having concluded that there is no conflict between this Circuit and the Fifth Circuit on the legal standard involved, we find the *McIntosh* case to be persuasive and adopt its rationale as dispositive of the issue in this case.

Appellant makes two arguments with respect to the sufficiency of the evidence on the §641 charges which can be dealt with summarily. He contends that there is no evidence to justify the jury's finding that he possessed the requisite criminal intent to commit the offenses. We find there is clearly sufficient evidence to support the jury's determination, for example, the inconsistent responses to the inquiring FmHA officials and the false statement on the Johnson closing statement.

Appellant also claims that there is no evidence that he converted any of the government's funds to his own use. He dismisses the government's evidence regarding the transfer of money from the trust account to the Yong Sun, Inc. account by suggesting that Yong Sun Chong's testimony explained the real source of the corporation's down payment. In essence, the appellant is asking us to grant conclusive effect to Yong Sun Chong's testimony on this factual issue. This we cannot do, and there is no basis in the record for overturning the jury's determination.

Appellant argues that the trial court erred in instructing the jury that "[W]hether or not the government was deceived or suffered monetary loss because of the acts charged in the indictment is immaterial." It is conceded that this statement of law is accurate with respect to the §1001 charge, *see United States v. Hicks*, 619 F.2d 752, 754-755 (8th Cir. 1980) (and cases cited therein). However, Bailey contends that the judge's charge directly conflicts

with an essential element of the §641 violation, as stated in *United States v. Collins*, 464 F.2d 1163, 1165 (9th Cir. 1972) and its progeny, i.e., that the government must prove it suffered an actual property loss. Since the trial judge read the challenged instruction immediately after defining the terms of the §641 charges, and before describing the elements of the §1001 charge, there was a clear possibility the jury was misled if *Collins* is good law. However, after an extensive review of the authorities, we conclude that the court in *Collins* erred and that the government does not have the burden of proving a property loss in order to obtain a conviction under §641.

In *Collins* the defendant was charged under §641 for forging and negotiating checks on a bank account funded in part by federal money. At trial the District Court decided, as a matter of law, that the money obtained by the defendant was government property for purposes of the statute. In a two-to-one decision the Court of Appeals reversed on that issue. Utilizing a commercial paper analysis, the majority determined that the funds received were not federal property since, when a bank pays a draft bearing a forged endorsement it expends its own money, not that of the depositor.[4] After reaching that conclusion, the majority stated:

> It is an essential element of the crime of stealing government property in violation of 18 U.S.C. §641 that the Government have suffered an actual property loss. 462 F.2d at 1165.[5]

---

[4] In addition to the dissent authored by United States District Judge Charles Powell, the majority's analysis on this issue has been criticized in *United States v. Pavloski*, 574 F.2d 933, 935-936 (7th Cir. 1978) and *United States v. Improto*, 542 F.Supp. 904, 908 fn. 7 (E.D. Pa. 1982), *aff'd* 707 F.2d 1392 (3rd Cir. 1983), *cert. den.* 103 S.Ct. 2457 (1983); *see also United States v. Mitchell*, 625 F.2d at 161 (and cases cited therein).

[5] This Circuit expressed some doubt about this proposition in *United States v. Mitchell*, 625 F.2d at 161-162, but determined that it did not need to decide the issue.

The opinion provided no rationale in support of this requirement but merely cited *United States v. Johnston*, 268 U.S. 220 (1924) and *United States v. Alessio*, 439 F.2d 803 (1st Cir. 1971). However, neither of those cases state that an actual property loss is an element of a §641 violation nor are their holdings based in any way upon that proposition.

In *United States v. Johnston*, the defendant failed to pay the federal tax on admission fees to a boxing contest. Thereafter, he was convicted of failing to pay the tax and embezzling that portion of the fees representing the tax. The District Court vacated the embezzlement conviction, was reversed by the Court of Appeals, but was then upheld by the United States Supreme Court. The Court reasoned that:

> It seems to us that under this [tax] law the person required to pay over the tax is a debtor and not a bailee. The money paid for the tax is not identified at the outset but is paid with the price of the ticket that belongs to the owner of the show. We see no ground for requiring the ticket office of a theatre to create a separate fund by laying aside the amount of the tax on each ticket and to keep it apart, either in a strong box or as a separate deposit in a bank. 268 U.S. at 226-227.

The court's holding was that the portion of the funds representing the tax had not become the government's property in the hands of the defendant and, therefore, its retention by the defendant could not constitute embezzlement. This was simply an application of the principle previously recognized in *United States v. Mason*, 218 U.S. 517 (1910) that where a debtor-creditor relationship exists the unlawful retention of funds by the debtor is not embezzlement. Nowhere in the opinion in *Johnston* was the issue of the existence of a government property loss ever mentioned. Therefore, we do not find that *Johnston* is authority for the proposition stated in *Collins*.

In *Alessio*, the defendant was charged under §641 with larceny of government property. One of the items of property allegedly stolen from the government agency was United States currency which was maintained in a petty cash fund. At trial, defense counsel attempted to show that the cash was actually owned by an employee who owed it to the government. The trial court precluded this defense, however, by ruling that the money belonged to the government. The Court of Appeals reversed, stating:

> The court could properly make a ruling of law with respect to title, predicated upon findings of fact which it left to the jury. However, it is clear that the court did more. It left nothing to the jury. It made a "finding" that the money belonged to the government, which was not only an essential element in the government's case, but depended upon an acceptance of the testimony of the government witnesses. The court cannot make a finding accepting the government's testimony, no matter how clear it may be; the burden still remained on the government to prove the money in the fund belonged to it. 439 F.2d at 804.

Thus, the court in *Alessio* focused strictly on the requirement of §641 that the property misappropriated must be found by the jury to be government property. There is no discussion in the opinion of the need to show an actual property loss and no such requirement can be properly inferred from its holding. Therefore, we conclude that the *Alessio* case also does not support the principle stated in *Collins*.

Thus, our analysis of the *Collins* case reveals there was no explanation for the court's promulgation of the essential element that the government must prove a property loss and the cases cited as authority for the proposition do not support it. In subsequent cases, the Ninth Circuit has reiterated the requirement but still has provided no explanation for it, *see United States v. Johnson*, 596 F.2d 842, 846 (9th Cir. 1975); *United States v. Hughes*, 626 F.2d 619, 621 (9th Cir. 1980); *United States v. Gibbs*, 704 F.2d

464, 465 (9th Cir. 1983); *United States v. Long*, 706 F.2d 1044, 1048 (9th Cir. 1983); *see also United States v. Fleetwood*, 489 F.Supp. 129, 132 (D. Ore. 1980). Other courts have adopted the principle from the *Collins* case but have also provided no analysis for it. *United States v. Evans*, 572 F.2d 455, 471 (5th Cir. 1978); *United States v. Forcellati*, 610 F.2d 25, 30 (1st Cir. 1979), *cert. den.* 445 U.S. 944 (1980); *United States v. Farrell*, 418 F.Supp. 308, 310 (M.D. Penn. 1976); *United States v. Edwards*, 473 F.Supp. 81, 82 (D. Mass. 1979); *United States v. Gavin*, 535 F.Supp. 1345, 1348 (W.D. Mich. 1982). Thus, despite a raft of recitations, no explanation has been provided for the conclusion that loss is an essential element of a §641 violation. Therefore, we must proceed to an independent analysis of the statute.

We begin with the premise that when Congress utilizes a common law term or a legal term with an established meaning, the courts should apply the accepted definition absent a clear indication to the contrary, *see Morissette v. United States*, 342 U.S. 246, 263 (1952); *United States v. Turley*, 352 U.S. 407, 411 (1957). In *Morissette* the court analyzed the legislative background of §641 and concluded:

> The history of §641 demonstrates that it was to apply to acts which constituted larceny or embezzlement at common law and also acts which shade into those crimes but which, most strictly considered, might not be found to fit their fixed definitions. 342 U.S. at 269, fn. 28.

Therefore, we must look to the historical development of embezzlement to determine its definition in the context of the statute.

Embezzlement is a venerable concept but is not, technically speaking, a creature of common law. It was created and defined by statute in England in 1799[6] and was subse-

[6] In *Rex v. Bazeley*, 2 East P.C. 571, 168 Eng. Reprint 517 (1799), a bank teller was charged with larceny for appropriating to his

(Footnote continued on following page)

quently adopted by legislatures in the United States. Basically, embezzlement is common law larceny extended to cover situations in which the stolen property initially comes into possession of the defendant without a trespass. Through frequent use and analysis it has obtained a settled meaning:

> Embezzlement is the fraudulent appropriation of property by a person to whom such property has been entrusted, or into whose hands it has lawfully come. It differs from larceny in the fact that the original taking of the property was lawful, or with the consent of the owner, while in larceny the felonious intent must have existed at the time of the taking. *Moore v. United States*, 160 U.S. 268, 269 (1845).

The elements of embezzlement are:

> (1) a trust or fiduciary relationship, (2) that the property claimed embezzled is embraced within the meaning of the statute, (3) that it came into the possession or care of accused by virtue of his employment, (4) it is property of another, (5) that his dealing therewith constituted a fraudulent conversion or appropriation of same to his own use, and (6) such was with the intent to deprive the owner thereof. *United States v. Powell*, 294 F.Supp. 1353 (E.D. Va. 1968), *aff'd* 413 F.2d 1037 (4th Cir. 1960); *see also* 29A C.J.S. *Embezzlement* §5 (1965).

The courts have also had ample opportunity to determine what is irrelevant to an embezzlement charge. Proof of the victim's property loss has consistently been held to be unnecessary to prove embezzlement, *Robinson v.*

---

[6] *continued*
own use cash received from a customer in the course of business. Based on the technical requirement of larceny that the original taking be unlawful, the defendant was acquitted. In response to this unpopular decision, a statute was passed which first defined embezzlement as a criminal offense, 39 Geo. III, c. 85 (1799), *see* 3 Wharton's Criminal Law §395 (14th ed. 1980).

United States, 30 F.2d 25, 28 (6th Cir. 1929); *Mulloney v. United States*, 79 F.2d 566, 581 (1st Cir. 1935), *cert. den.* 296 U.S. 658 (1936); *Rakes v. United States*, 169 F.2d 739, 743 (4th Cir. 1948), *cert. den.* 335 U.S. 826 (1948); *Golden v. United States*, 318 F.2d 357, 361 (1st Cir. 1963); *United States v. Weaver*, 360 F.2d 903, 905 (7th Cir. 1966). It is also settled law that proof that no loss was suffered by the victim is not a defense to an embezzlement charge, *Weinhandler v. United States*, 20 F.2d 359, 362 (2nd Cir. 1927), *cert. den.* 275 U.S. 554 (1927); *Hause v. United States*, 78 F.2d 296, 300 (6th Cir. 1935); *Hancey v. United States*, 108 F.2d 835, 837 (10th Cir. 1940); *Dobbins v. United States*, 157 F.2d 257, 259 (D.C. Cir. 1946), *cert. den.* 329 U.S. 734 (1946); *see also* 29A C.J.S. *Embezzlement*, §25b (1965).

The rationale underlying these holdings was clearly demonstrated in *Elmore v. United States*, 267 F.2d 595 (4th Cir. 1959). Elmore was the manager of a grain storage warehouse in which the Commodity Credit Corporation (CCC), a Federal agency, stored fungible grain. The defendant was charged and convicted, *inter alia*, of embezzling quantities of wheat belonging to the CCC. The defendant argued on appeal that the district court should have directed a verdict for him on the embezzlement charges because he was able to produce sufficient wheat upon the demand of the CCC. However, the Court of Appeals rejected this contention:

> The present case is based on the charge that the defendant, having lawful custody of the grain, made use of it as if it were his own and the charge was sustained by proof that he actually withdrew grain of the C.C.C. without the production of warehouse receipts, sold it at a profit and replaced it with grain which he had bought from the C.C.C. at a discount, for restricted use, and sold without restriction in violation of his contract with the Corporation. We are at a loss to understand, in view of these facts, the contention that there was no evidence that the defendant intended to convert the wheat, unless it is

> meant that it was his intention to replace it after he had used it for his own purposes. But neither the intention to replace nor the actual replacement is a defense when conversion is proved. *The criminal sanction of the statute is imposed to prohibit the unlawful use of another's property, and the statute does not permit the converter to subject the owner to the risk of loss and relieve the converter of criminal liability if his operations are successful and he makes restitution.* 267 F.2d at 601. [Footnote deleted, emphasis supplied.]

This policy is also consistent with the purpose of §641 which is to provide a sanction for intentional conduct by which a person either misappropriates or obtains a wrongful advantage from government property, *see Morissette v. United States*, 342 U.S. at 271. The additional requirement of proof of the victim's property loss is not consistent with the settled definition of embezzlement nor does it implement, in any fashion, the policy behind the statute. Congress intended to adhere to the traditional elements of embezzlement and if there was to be any deviation it was to be in the direction of eliminating technical requirements, not adding new ones, *see Morissette*, 342 U.S. at 269 quoted *supra*, p. 13; *see also United States v. Howey*, 427 F.2d 1017, 1018 (9th Cir. 1970). We note that other federal criminal statutes which are similarly designed do not require proof of the victim's property loss; *Elmore v. United States*, 267 F.2d 595, 601 quoted *supra* p. 16 (15 U.S.C. §714m(b), Embezzlement of property from Commodity Credit Corporation); *United States v. Fortunato*, 402 F.2d 79, 81 (2nd Cir. 1968) *cert. den.* 394 U.S. 932 (1969) (18 U.S.C. §656, Theft, embezzlement or misapplication by bank official or employee); *United States v. Scheper*, 520 F.2d 1355, 1358 (4th Cir. 1975) (18 U.S.C. §656); *United States v. Landers*, 576 F.2d 94, 96 (5th Cir. 1978) (18 U.S.C. §656); *United States v. Daley*, 454 F.2d 505, 509-510 (1st Cir. 1972) (18 U.S.C. §664, Theft or embezzlement from employee benefit plan); *United States v. Coleman*, 590 F.2d 228, 230 (7th Cir. 1978) *cert. den.*

440 U.S. 980 (1979) (18 U.S.C. §665, Theft or embezzlement from Manpower funds); *United States v. Gibson*, 675 F.2d 825, 828 (6th Cir. 1982) *cert. den.* 103 S.Ct. 305 (1982) (29 U.S.C. §501(c), Embezzlement of assets of a labor organization).

In summary, we must disagree with the Ninth Circuit (and those courts which have followed it) as to whether proof of the government's property loss is an essential element of 18 U.S.C. §641. Our review of relevant authorities provides no support for the proposition and the *Collins* case is unpersuasive. We are not, of course, eager to create a conflict between the Circuits but it is necessary in this case. While in most situations the government would have no difficulty proving a property loss, cases have arisen where the requirement creates cumbersome and hypertechnical problems, *see e.g. United States v. Gibbs, supra* and *United States v. Edwards, supra.* We seen no reason to permit this irrelevant consideration to confuse the jury and to burden the judge. Therefore, we now hold that proof of the government's property loss is unnecessary to prove a violation of 18 U.S.C. §641. Based on that determination, we find no error in the judge's charge to the jury in this case.

With respect to the §1001 conviction, the appellant argues that the government failed to prove that the misrepresentation on the Johnson closing statement related to a material fact. Materiality is an essential element of a §1001 charge, *United States v. DiFonzo*, 603 F.2d 1260, 1266 (7th Cir. 1979), *cert. den.* 444 U.S. 1018 (1980) (and cases cited therein). We believe there is no merit to the contention that an escrow agent's statement regarding the disposition of approximately $33,000 is immaterial to the government agency that is making the loan. The discussion in *United States v. McIntosh*, 655 F.2d at 82-83 is directly on point and supports our position. Further elucidation is unnecessary.

The appellant suggests that the district judge erred in sentencing him because he stated that "I am satisfied that prompt and full restitution is unlikely which makes pro-

bation or fines inappropriate in this matter, Sent. tr. p. 10. Quoted alone and out of context, it might appear that the court's statement violates *United States v. Wiley*, 267 F.2d 453 (7th Cir. 1959) and *Williams v. Illinois*, 399 U.S. 235 (1970). However, in the context of the judge's entire explanation for the sentence, quoted *supra* p. 8, we find that it is clear that there were other justifiable considerations underlying the sentencing decision and therefore we find no error.

Finally, the appellant argues that his attorney's conduct denied him effective assistance of counsel. The standard of review for this question is whether the defendant received "legal assistance which meets a minimum standard of professional representation," *United States ex rel. Williams v. Twomey*, 510 F.2d 634, 641 (7th Cir. 1975), *cert. den.* 423 U.S. 876 (1975). The most significant allegation regarding ineffective assistance is that defense counsel told the jury in his opening statement that he would put the defendant on the stand to explain the transactions. However, the defendant did not take the stand. Defendant's attorney explained the change in plans in his closing argument by saying that the government had failed to prove its case, implying thereby that the defendant's testimony was unnecessary.[7] We believe this was a legitimate tactical decision. It could have favorably influenced the jury by suggesting the defense was so confident in the weakness of the government's case that rebuttal was unnecessary. This strategy could also have disrupted the government's case, especially if it had saved some damaging evidence to use in its cross-examination of the defendant. There are numerous other tactical considerations which could have motivated the change in plans. The fact that the strategy did not work is not a basis for the finding of ineffective assistance, *see United States v. Weston*,

[7] We note that the appellant does not argue that his counsel at trial did not obtain his consent for this decision or that he prevented him from taking the stand.

708 F.2d 302, 306 (7th Cir. 1983). The appellant notes other alleged errors on the part of defense counsel but, even considered in the aggregate, they do not constitute "grossly incompetent professional conduct," *Williams v. Twomey*, 510 F.2d at 640.

For the reasons stated above, the convictions are affirmed.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

USCA 40227—Midwest Law Printing Co., Inc., Chicago—5-11-84—400

No. 84-74

In the Supreme Court of the United States

OCTOBER TERM, 1984

WILLIAM R. BAILEY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

REX E. LEE
Solicitor General

STEPHEN S. TROTT
Assistant Attorney General

SARA CRISCITELLI
VINCENT MACQUEENEY
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 633-2217

15 pp

QUESTION PRESENTED

Whether the district court's inadvertent instruction suggesting that proof of monetary loss to the government was not required under 18 U.S.C. 641 constituted plain error.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Page

Cases—Continued:

Statutes and rules:

Page

Statutes and rules—Continued:

Miscellaneous:

In the Supreme Court of the United States

OCTOBER TERM, 1984

No. 84-74

WILLIAM R. BAILEY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-18) is reported at 734 F.2d 296.

JURISDICTION

The judgment of the court of appeals was entered on May 11, 1984. The petition for a writ of certiorari was filed on July 10, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Central District of Illinois, petitioner was convicted on three counts of embezzlement, in violation of 18 U.S.C. 641, and one count of filing a false statement, in violation of 18 U.S.C. 1001. Petitioner was sentenced to concurrent terms of ten years' imprisonment on the embezzlement

counts and five years' imprisonment on the false statement count. The court of appeals affirmed (Pet. App. 1-18).

The evidence at trial showed that petitioner was authorized to act as a closing attorney and escrow agent in connection with loans made by the Farmers Home Administration (FmHA), an agency of the federal government. Petitioner embezzled almost $65,000 in FmHA loan proceeds that he was obligated to apply to the borrowers' outstanding debts, including in some cases prior FmHA loans. When questioned by the FmHA about the disposition of the proceeds of one of the loans, petitioner responded that he had sent the agency a check for the balance of the funds, and later stated that he would soon send the agency a check. No such check, however, was ever received from petitioner. The loan proceeds were deposited in petitioner's trust account, and some of the funds were traced to personal expenditures, including the purchase of a tavern. Pet. App. 3-5.

The court charged the jury that "whether or not the government was deceived or suffered monetary loss because of the acts charged in the indictment is immaterial" (Pet. App. 8). This instruction was submitted by the government as part of its proposed instructions concerning the false statement offense. See Appellee's C.A. Br. 22-23. The court, however, apparently inadvertently shifted the order of the instructions and read the quoted statement immediately after its embezzlement instructions but before the portion of the charge concerning the false statement count. Accordingly, as the government conceded in the court of appeals, it was not entirely clear to which offense the instruction applied. Pet. App. 9; Appellee's C.A. Br. 23. Petitioner did not object to the instruction as given.

The court of appeals affirmed, concluding that proof of loss to the government is not an essential element of embezzlement under 18 U.S.C. 641 (Pet. App. 8-16). The court

noted that "[p]roof of the victim's property loss has consistently been held to be unnecessary to prove embezzlement" and reasoned that this rule is "consistent with the purpose of § 641 which is to provide a sanction for intentional conduct by which a person either misappropriates or obtains a wrongful advantage from government property" (Pet. App. 13, 15). The court declined to follow the statement in *United States* v. *Collins*, 464 F.2d 1163, 1165 (9th Cir. 1972), that proof of loss to the government is essential, concluding that "there was no explanation for the court's promulgation" of this requirement and that "the cases cited as authority for the proposition do not support it" (Pet. App. 11).

ARGUMENT

Petitioner contends (Pet. 4-8) that the court of appeals erred in concluding that monetary loss to the United States is not an essential element of embezzlement under 18 U.S.C. 641 and that its decision is in conflict with those of other courts of appeals.[1] Although we believe that the Seventh Circuit's resolution of this question is correct, there is no need to address the alleged intercircuit conflict in this case. The issue arose from an inadvertent error in the order of the instructions, which was never objected to by petitioner; the

---

[1]Petitioner's related claim (Pet. 8-9) that the instruction in question negated the requirement that *federal* funds be embezzled is plainly without merit. The district court referred in its instructions at least three times to the requirement that the government prove that petitioner had embezzled money "of the United States" (Tr. 228-230). Moreover, petitioner told the jury in closing argument that the victim in this case was the United States and not the individuals involved in the loans (*id.* at 204-205; see also *id.* at 210, 211). Petitioner does not contend that the evidence failed to establish the federal character of the embezzled funds (see note 3, *infra*), and the court's instructions and his own closing argument plainly focused the jury's attention on this issue. Accordingly, there is no realistic possibility that "[t]he jury may have decided that the borrowers were the parties who were deprived of their funds, and that the only loss suffered was by them" (Pet. 9).

remainder of the instructions made clear that conversion is a necessary element of embezzlement under Section 641; and the evidence that the government suffered a property loss in this case is overwhelming. In any event, the alleged conflict results simply from one circuit's dictum, and does not represent a substantial disagreement over the interpretation of Section 641.

1. As we have noted (page 2, *supra*), the instruction in question was shifted from its intended place among the other false statement instructions to a place between the embezzlement and false statement instructions. Not only was the instruction wholly proper with respect to the Section 1001 false statement offense,[2] it signified by its reference to whether the government was "deceived" that it related to that count and not to the embezzlement counts. Had petitioner objected, the district court could have clarified that the instruction applied only to the Section 1001 count. As this Court has observed, "[i]t is the rare case in which an improper instruction will justify reversal of a criminal conviction when no objection has been made in the trial court." *Henderson* v. *Kibbe*, 431 U.S. 145, 154 (1977) (footnote omitted); see also *United States* v. *Frady*, 456 U.S. 152, 163 & n.14 (1982); Fed. R. Crim. P. 30, 52(b).

This is not that "rare case." Even accepting petitioner's construction of Section 641, the charge to the jury did not constitute plain error. Petitioner seizes upon a single misplaced sentence, ignoring the balance of the charge, which fully set forth the elements of the offense. The court instructed the jury (Tr. 230) that to " 'embezzle' means wilfully to take or convert to one's own use another's money

---

[2]See, *e.g.*, *United States* v. *Gilliland*, 312 U.S. 86, 93 (1941); Pet. App. 8; 2 Devitt & Blackmar, *Federal Jury Practice and Instructions* § 28.07 (3d ed. 1977). See also *United States* v. *Yermian*, No. 83-346 (June 27, 1984).

or property" and that "to 'convert' money or property to one's own use means to apply or appropriate or use such money or property for the benefit or profit of the wrongdoer." Reading the charge as a whole, it is clear that the jury was adequately instructed concerning any need for loss to the government by virtue of the instructions requiring that the government prove that its property was taken or converted by petitioner. See also note 1, *supra.*

Moreover, the evidence in this case that the government suffered an actual loss is overwhelming, and indeed not disputed by petitioner. The embezzled funds originated with the government, and petitioner was required to dispense them in accordance with the FmHA's instructions.[3] With respect to each of the loan transactions, petitioner was obligated to remit all or part of the funds he held in escrow to the FmHA, but failed to do so (see Pet. App. 3-5). In these circumstances, petitioner's claim of plain error must fail.

2. In any event, petitioner's claim of a conflict among the circuits on the question of whether proof of actual loss to the government is required under Section 641 does not withstand analysis. In *United States* v. *Collins, supra,* the court reversed a conviction not because the government failed to prove a loss, but because it failed to prove that the embezzled property actually belonged to the United States. The court reasoned that a stolen warrant, drawn by the City and County of San Francisco on an account containing federal funds, belonged to the City and County, not to the

---

[3]The agency's instructions to petitioner concerning the proper use of the funds clearly constituted sufficient federal control to render the funds "money * * * of the United States" for purposes of Section 641, even though they had been paid to the borrowers (see Pet. App. 7-8). See, *e.g., United States* v. *Benefield,* 721 F.2d 128 (4th Cir. 1983); *United States* v. *McIntosh,* 655 F.2d 80, 83-84 (5th Cir. 1981), cert. denied, 455 U.S. 948 (1982).

United States. Because the government's money "in legal contemplation remain[ed] in its account," the court concluded that no property of the United States was ever taken by the defendant (464 F.2d at 1165):

> Even if we assume that the Government owned the money against which the warrant was drawn, the piece of paper Collins stole belonged to the City and the money [Collins obtained] to the bank; nothing he took belonged to the Government.

It was in this context that the court went on to state (*ibid.*) that "[i]t is an essential element of the crime of stealing Government property in violation of 18 U.S.C. § 641 that the Government have suffered an actual property loss." Interpreted with reference to the question before the court, then, the remark was simply a restatement, if an inartful one, of the court's conclusion that the government must have an interest in the embezzled property.[4] Interpreted as petitioner would suggest, the statement can only be regarded as dictum. Similarly, the other cases relied on by petitioner

---

[4]This reading is reinforced by an examination of the cases relied on by the court, *United States* v. *Johnston*, 268 U.S. 220, 226-227 (1925), and *United States* v. *Alessio*, 439 F.2d 803 (1st Cir. 1971) (per curiam), both of which addressed the question whether the embezzled property was owned by the United States. See Pet. App. 10-11. Indeed, the First Circuit affirmed after its decision in *Alessio* that permanent loss to the victim is not an element of embezzlement. *United States* v. *Daley*, 454 F.2d 505, 509-510 (1972). Moreover, although the Ninth Circuit has continued to cite *Collins* for the proposition that actual loss is required (see, *e.g.*, *United States* v. *Long*, 706 F.2d 1044, 1048 (1983); *United States* v. *Gibbs*, 704 F.2d 464, 465 (1983) (per curiam)), neither that court nor any other court of appeals has ever reversed a conviction under Section 641 for failure to prove an actual loss to the government where the government had a sufficient interest in the embezzled property. Finally, the Ninth Circuit has, since *Collins*, suggested that loss to the victim of embezzlement is not essential. See *United States* v. *Tingle*, 658 F.2d 1332, 1337 (1981) ("[a]ll that is necessary * * * to commit a conversion * * * is that [the defendant] exercise dominion and control over the money inconsistent with the [true owner's] rights").

(Pet. 4-5) hold only that Section 641 requires proof of the government's interest in the embezzled property.[5]

It is well established that the victim of an embezzlement need not suffer an actual and permanent property loss.[6] Rather, embezzlement requires only "a serious act of interference with the owner's rights." W. LaFave & A. Scott, *Handbook on Criminal Law* § 89, at 645 (1972). As the

---

[5]In *United States* v. *Evans*, 572 F.2d 455, 470-471 (5th Cir. 1978), the court cited *Collins* in the course of addressing the defendants' argument that "the government failed to prove that the [embezzled] funds were government property * * * [and] that the district court erroneously failed to submit this issue to the jury." The court explained (572 F.2d at 474 n.20) that

> [t]he *ratio decidendi* of the *Collins* majority was simply the principle that a bank which is induced to pay a check upon a forged endorsement loses its own money and not that of its depositor.

Similarly, in *United States* v. *Forcellati*, 610 F.2d 25, 30 (1st Cir. 1979), the question was whether the government retained a sufficient property interest in a Treasury check after it had been mailed to the payee; the court noted that in *Collins*, the warrant was the city's and not the federal government's, and cited the case only for the proposition that "the receipt of a check or warrant by a third person does not end the issuer's property interest in the instrument." See also *United States* v. *Gavin*, 535 F. Supp. 1345, 1348 (W.D. Mich. 1982) ("The dispositive issue is whether the Government has shown * * * a continuing federal interest in the funds"); *United States* v. *Edwards*, 473 F. Supp. 81, 81 (D. Mass. 1979) (defendant asserted that the embezzled check "was not the property of the United States"); *United States* v. *Farrell*, 418 F. Supp. 308, 310 (M.D. Penn. 1976) ("the government must establish a property interest in the [stolen goods]").

[6]See, *e.g.*, *United States* v. *Cauble*, 706 F.2d 1322, 1354 (5th Cir. 1983), cert. denied, No. 83-585 (Jan. 23, 1984); *Golden* v. *United States*, 318 F.2d 357, 361 (1st Cir. 1963); *United States* v. *Matsinger*, 191 F.2d 1014, 1018 (3d Cir. 1951); *Rakes* v. *United States*, 169 F.2d 739, 743 (4th Cir.), cert. denied, 335 U.S. 826 (1948); *Dobbins* v. *United States*, 157 F.2d 257, 259 (D.C. Cir. 1946); *Hancey* v. *United States*, 108 F.2d 835, 837 (10th Cir. 1940); *Weinhandler* v. *United States*, 20 F.2d 359, 362 (2d Cir.), cert. denied, 275 U.S. 554 (1927); see also *Commissioner* v. *Wilcox*, 327 U.S. 404, 408-409 (1946).

court below recognized (Pet. App. 11-16), there is nothing in the language, history, or policy of Section 641 that would require a different result under that statute. The most natural reading of *Collins* and the cases that cite it is in accord with this conclusion. Petitioner's reading would lead to the incongruous result that one could take property of the United States, even for an extended period, and escape prosecution simply by making restitution. This is not the law, nor should it be.[7] See, *e.g., Elmore* v. *United States,* 267 F.2d 595, 601 (4th Cir. 1959).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

REX E. LEE
Solicitor General

STEPHEN S. TROTT
Assistant Attorney General

SARA CRISCITELLI
VINCENT MACQUEENEY
Attorneys

OCTOBER 1984

---

[7]Even if this were the standard, petitioner could not meet it. At least one of the prior FmHA liens, in the amount of more than $30,000, that petitioner was obligated to satisfy out of the loan proceeds he received had not been repaid at the time of trial (Tr. 31, 164-165; see also Pet. App. 3-4).